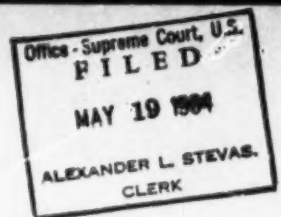


No. 83-6589



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

OLAN RANDLE ROBISON,

Petitioner,

vs.

THE STATE OF OKLAHOMA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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May, 1984

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RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

The respondent, State of Oklahoma, by and through Michael C. Turpen, Attorney General of the State of Oklahoma, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Opinion of the Court of Criminal Appeals of the State of Oklahoma entered on January 13, 1984, and which was corrected on April 2, 1984.

OPINION BELOW

The Opinion of the Oklahoma Court of Criminal Appeals is reported at 677 P.2d 1080 (Okla. Cr. 1984).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in part:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

The Fifth Amendment to the United States Constitution provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless

on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Title 21 O.S.Supp.1976, § 701.7 provided in part:

"A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof."

B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson.

Title 21 O.S.Supp.1976, § 701.9 provided in part:

"A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life."

Title 21 O.S.Supp.1976, § 701.10 provided as follows:

"Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation. If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death."

Title 21 O.S.Supp.1976, § 701.11 provided as follows:

"In the sentencing proceeding, the statutory instructions as determined by the trial judge

to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life."

Title 21 O.S.Supp.1976, § 701.12 provided as follows:

"Aggravating circumstances shall be:

1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;
2. The defendant knowingly created a great risk of death to more than one person;
3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
4. The murder was especially heinous, atrocious, or cruel;
5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;
6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony; or
7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."

Title 21 O.S.Supp.1976, § 701.13 provided as follows:

"A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together with a notice prepared by a clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and

supplied by the Oklahoma Court of Criminal Appeals.

B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

C. With regard to the sentence, the court shall determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and

3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

E. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

1. Affirm the sentence of death; or

2. Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

STATEMENT OF THE CASE

The Petitioner, Olan Randle Robison (hereinafter referred to as the "Petitioner"), was convicted of 3 counts of Murder in the First Degree in the District Court of Stephens County in violation of 21 O.S.Supp.1976, § 701.7. The Petitioner was convicted by a jury which then heard evidence in the second stage of the trial and found the existence of 4 aggravating circumstances,¹

¹ The jury found that (1) the Petitioner knowingly created a great risk of death to more than one person (2) the defendant had previously been convicted of a felony involving the use of threat of violence to the person (3) there exists a probability that the Petitioner would commit criminal acts of violence that would constitute a continuing threat to society (4) the murder of the victim Averil Bourque was especially heinous, atrocious or cruel. 21 O.S.Supp.1976, § 701.12 (1) (2) (4) (7).

and sentenced the Petitioner to death.

The facts of the case are set forth in detail in the reported opinion of the Oklahoma Court of Criminal Appeals referred to previously. The Petitioner and two other persons robbed and murdered two women and a man in their home which was located on the outskirts of a small rural town in Oklahoma. One of the female victims, Averil Bourque, was shot once in the left breast, once in the right ear and twice between the eyes. The wounds in the ear and the eyes were caused by close range gunshots.

REASONS WHY THE WRIT SHOULD BE DENIED

PROPOSITION I

THE AGGRAVATING CIRCUMSTANCES THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AND THAT THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MORE THAN ONE PERSON HAVE NOT BEEN IMPERMISSIBLY CONSTRUED BY THE OKLAHOMA COURT OF CRIMINAL APPEALS AND THE FACTS OF THIS CASE REVEAL THAT THE ACTS OF THE DEFENDANT FALL CLEARLY WITHIN THE DEFINITIONS OF THESE TWO AGGRAVATING CIRCUMSTANCES.

The Petitioner first attacks the manner in which the aggravating circumstance that the murder was "especially heinous, atrocious or cruel," as set forth in 21 O.S.Supp.1976, § 701.12(4) is being applied by the Oklahoma Court of Criminal Appeals in an overbroad and inconsistent manner.

It should first be recognized that this Court has upheld the identical aggravating circumstance as construed by the Supreme Court of Florida. Proffitt v. Florida, 428 U.S. 242, 255-256 (1976). See also Barclay v. Florida, ___ U.S. ___, 103 S.Ct. 3418, 3421, 77 L.Ed.2d 1134 (1983).

In Oklahoma the Oklahoma Court of Criminal Appeals has upheld the death penalty in 9 other cases wherein a defendant was found to have committed a crime that was especially heinous, atrocious or cruel. Stafford v. State, 669 P.2d 285 (Okla. Cr. 1983) (defendant murdered a husband, wife and twelve-year old son who had stopped along an Interstate highway at night to assist the defendant's wife who had been acting as a stranded motorist to lure a robbery victim to assist her); Coleman v. State, 668 P.2d 1126 (Okla. Cr. 1983) (defendant murdered a husband and wife at close range with a shotgun who had discovered the defendant

burglarizing a house); Davis v. State, 665 P.2d 1186 (Okla. Cr. 1983) (defendant murdered two people and wounded two others with a handgun); Stafford v. State, 665 P.2d 1205 (Okla. Cr. 1983) (defendant murdered six persons who were employees of a steak house who had been herded by the defendant and his brother into a frozen foods locker at the restaurant); Ake v. State, 663 P.2d 1 (Okla. Cr. 1983) (defendant murdered a minister and wife and wounded their two children during a robbery of their residence); Jones v. State, 648 P.2d 1251 (Okla. Cr. 1982) (defendant's shooting spree in bar killed one and critically wounded two others); Hays v. State, 617 P.2d 223 (Okla. Cr. 1980) (defendant murdered by shooting in the back of the head a shopkeeper during the course of a robbery); Eddings v. State, 616 P.2d 1159 (Okla. Cr. 1980), rev. on other grounds, 455 U.S. 104 (1982) (defendant murdered a highway patrol trooper at close range who had approached his vehicle after a traffic stop); Chaney v. State, 612 P.2d 269 (Okla. Cr. 1980) (defendant kidnapped and strangled two women for ransom).

The State contends that the facts of the present case fall within the criteria established in the above stated cases with regard to a finding that those murders are especially heinous, atrocious or cruel. Certainly the facts surrounding the death of the victim, Averil Bourque, whose body was found with multiple gunshot wounds from a weapon fired at close range support this finding. It should be again noted that the wounds in Ms. Bourque's ear and the two between her eyes were inflicted at close range. This murder clearly qualifies under any definition as especially heinous, atrocious or cruel. The fact that the jury did not find this aggravating circumstance with regard to the other two victims demonstrates the proper application of this aggravating circumstance by the jury. This aggravating circumstance is obviously being applied in a "principle way" in the State of Oklahoma. Cf. Godfrey v. Georgia, 446 U.S. 420 (1980).

Furthermore, the Oklahoma statutes require the Oklahoma Court of Criminal Appeals to conduct a proportionality review of every death sentence. 21 O.S. Supp. 1976, § 701.13(C)(3). Cf.

Therefore, for the reasons stated there is no arbitrary application in the aggravating in Oklahoma with regard to the aggravating circumstance "especially heinous, atrocious or cruel."

The Petitioner also contends that the aggravating circumstance that the "defendant knowingly created a great risk of death to more than one person", 21 O.S.Supp.1976, § 701.12(2) is also being applied in an overbroad and inconsistent manner.

In the present case the Petitioner can hardly contend that his acts did not result in death to more than one person since three persons were executed during the course of a robbery. Also, the 8 other Oklahoma Court of Criminal Appeals cases in which the Oklahoma Court of Criminal Appeals has upheld a death penalty in which this aggravating circumstance was found by the jury demonstrate that this case is consistent with those. See Dutton v. State, 674 P.2d 1134 (Okl.Cr. 1984) (defendant murdered person operating a bar and wounded his mother during a robbery of that bar); Coleman v. State, 668 P.2d 1126 (Okl.Cr. 1983) (defendant murdered two persons with a shotgun at close range who interrupted him while he was in the act of committing a burglary); Stafford v. State, 669 P.2d 285 (Okl.Cr. 1983) (defendant murdered husband, wife and twelve-year old son who stopped to assist defendant's wife who was used as a ruse imitating a motorist whose car had been disabled); Stafford v. State, 665 P.2d 1205 (Okl.Cr. 1983) (defendant murdered six people who were placed in a meat freezer in a restaurant in the course of a robbery of that restaurant); Davis v. State, 665 P.2d 1186 (Okl.Cr. 1983) (defendant murdered two persons and wounds two others during a shooting spree); Jones v. State, 648 P.2d 1251 (Okl.Cr. 1982) (defendant murdered one patron and seriously wounds two others during a shooting spree in a bar); Hays v. State, 617 P.2d 223 (Okl.Cr. 1980) (defendant used a gun to menace a car of teenagers shortly after having executed the owner of a shoe store during a robbery); Chaney v. State, 612 P.2d 269 (Okl.Cr. 1980) (defendant kidnapped and strangled two women for ransom). The present case clearly falls within the previously cited cases as

the type of case in which this aggravating circumstance has been upheld.

This aggravating circumstance has also been upheld by the Florida Supreme Court in cases upheld by this Court. See Proffitt v. State, 428 U.S. 242, 256 (1976); Barclay v. Florida, ___ U.S. ___, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983).

PROPOSITION II

THE USE OF THE AGGRAVATING CIRCUMSTANCE REGARDING THE CREATION OF A GREAT RISK OF DEATH TO MORE THAN ONE PERSON IN THE SENTENCING STAGE OF A DEATH PENALTY PROCEEDING DOES NOT VIOLATE FEDERAL CONSTITUTIONAL PROVISIONS WITH REGARD TO THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In Proposition II the Petitioner contends that the use of the aggravating circumstance regarding the Petitioner's actions in creating a great risk of death to more than one person in the sentencing proceeding violates the double jeopardy provision of the Fifth Amendment to the United States Constitution as being a multiple punishment.

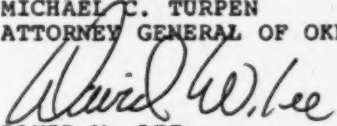
The State contends that it is obvious that this contention has no merit. As was noted previously, the State of Florida has a similar provision in their death penalty statutes and that statute has been upheld. See Barclay v. Florida, ___ U.S. ___, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); Proffitt v. Florida, 428 U.S. 242 (1976). Furthermore, in Missouri v. Hunter, ___ U.S. ___, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983), this Court upheld a conviction and sentencing of a defendant at a single trial on charges where the defendant was convicted of both first degree robbery and armed criminal action. The Court noted that "simply because two criminal statutes may be construed to proscribe the same conduct under the Blockburger test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes." 103 S.Ct. at 679.

CONCLUSION

For the reasons stated it is respectfully requested that the
Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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ATTORNEY GENERAL OF OKLAHOMA


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CERTIFICATE OF MAILING

On this 16th day of May, 1982, a true and correct
copy of the foregoing was mailed, postage prepaid, to:

Mary E. Bane
Oyler & Bane
Investors Capital Building
Oklahoma City, OK 73102



DAVID W. LEE

:bks

